(16)

Nos. 94-1893, 94-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, *et al.*,
Respondents.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioners,

v.

BELL ATLANTIC CORPORATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR BELLSOUTH CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

With the consent of the parties,[1] *amicus curiae* BellSouth Corporation hereby submits this brief in support of respondents. BellSouth provides over 20 million telephone access lines in nine States. Like other telephone companies, BellSouth is subject to the ban on the provision of video programming contained in 47 U.S.C. § 533(b). In fact, BellSouth has successfully challenged § 533(b) on First Amendment grounds, and a federal court has enjoined the Government from enforcing the statute against BellSouth. *See BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994), *appeal pending*, No. 94-7036 (11th Cir.).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of the constitutionality under the First Amendment of 47 U.S.C. § 533(b), which prohibits telephone companies from providing video programming to their local subscribers. The District Court and Court of Appeals in this case, like every other federal court to have considered the issue, invalidated the statute under the First Amendment. In the decision under review, the Fourth Circuit held that § 533(b) could not survive intermediate scrutiny, which petitioners contend is the appropriate level of judicial review. Although the statute fails any form of heightened review, § 533(b) is in fact subject to strict scrutiny, for several independent reasons. This Court should invalidate § 533(b) under the more exacting test, leaving intermediate scrutiny to be applied in the limited settings for which it was designed.

I. As a direct ban on speech alone, § 533(b) triggers strict scrutiny regardless of whether it is content-based. The statute is, in the words of the Federal Communications Commission, "a complete ban on editorial control [by a telephone company] over

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[1] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

video programming in [its] service area." Supp. Br. App. 4a.[2] Section 533(b) is analytically indistinct from a law prohibiting the owners of newspapers or magazines from exercising editorial control over any of the material carried in the pages of their publications. In fact, § 533(b) targets only the acts of editorial discretion that give cable television operators First Amendment protection in the first place. *See Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2456 (1994).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press"; it does not refer only to restrictions "on the basis of content." No law runs more directly afoul of the constitutional proscription than a flat ban on a particular type of speech, and such laws have long been subject to exacting judicial scrutiny, whether or not they are content-based. *See, e.g., City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2044-47 (1994); *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (*per curiam*); *Martin v. Struthers*, 319 U.S. 141, 145-49 (1943); *Schneider v. State*, 308 U. S. 147, 164-165 (1939). Indeed, this Court has made clear that even limitations on the *quantity* of a particular type of speech trigger First Amendment strict scrutiny. *E.g., Meyer v. Grant*, 486 U.S. 414, 419, 420, 424 (1988); *Buckley*, 424 U.S. at 15, 16, 17, 39, 44.

Section 533(b) prohibits telephone companies from engaging in an important and distinct type of expression. Accordingly, contrary to the claims of petitioners, the ban cannot properly be characterized as a "time, place, or manner" rule. *City of Ladue*, 114 S. Ct. at 2045; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1981); *Martin v. Struthers*, 319 U.S. at 145-49. Time, place, or manner rules regulate the *noncommunicative aspects* of a speaker's activity, such as its loudness, in order to address some basic incompatibility between the conduct conveying

[2] References to Federal Communications Commission's *Third Report and Order*, FCC 95-203 (May 16, 1995) are styled "Supp. Br. App. ___a." References to the decisions of the District Court and Court of Appeals, as reprinted in the Appendix to the Government's Petition for Certiorari in No. 94-1893, are styled as "Pet. App. ___a."

the communication and the primary activity occurring in the area in which the speaker wishes to speak. They may not, consistent with the First Amendment, ban a speaker from reaching his or her chosen audience. They may not single out particular speakers. Section 533(b) fulfills none of these requirements.

II. Section 533(b) also triggers strict scrutiny for the independent reason that it *is* indeed content-based. It prohibits telephone companies from offering only that "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19). Section 533(b)'s prohibition depends on the expressive content of the image transmitted. In this respect, § 533(b) is akin to a law banning signs containing pictures "generally considered comparable to" those included in nationally distributed newspapers, but permitting signs containing text or other types of pictures. Such a law would clearly be content-based and subject to strict scrutiny.

Indeed, the District Court in this case observed that the statute is indistinguishable, in constitutional terms, from a scheme that compiled an exhaustive list of television shows from the 1984 editions of *TV Guide* and then prohibited telephone companies from providing those shows or any programming "generally considered comparable to" them. Pet. App. 85a-86a n.22. "[B]y any commonsense understanding of the term, the ban in this case is 'content-based.'" *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516-17 (1993).

III. The definition of "video programming" is also so *vague* as to amount to a "know-it-when-we-see-it" standard which vests the FCC with impermissibly broad discretion over speech. There are no "'narrow, objective, and definite'" standards, *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992) (citation omitted), to constrain the Commission's determinations of what is and is not "video programming." Accordingly, § 533(b) is unconstitutional on its face.

IV. Finally, strict scrutiny is also warranted because § 533(b) is a ban on the speech of only a select group of speakers within a particular medium. *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). This case does not present the question of differential regulatory treatment of different types of media, as in *Turner Broadcasting*, but rather discriminatory treatment of certain speakers within a single medium.

ARGUMENT

I. AS A BAN ON SPEECH ALONE, SECTION 533(b) TRIGGERS STRICT SCRUTINY REGARDLESS OF WHETHER IT IS CONTENT-BASED

1. Section 533(b) bans telephone companies from providing their subscribers with video programming of the companies' own creation, editorial selection, or arrangement. This prohibition falls entirely on speech, and on nothing else. Section 533(b) does not, for example, prohibit telephone companies from transporting the video speech of others; rather, it bans telephone companies from providing video programming of their own. Nor does § 533(b) prohibit telephone companies from constructing or owning cable systems; instead, it bans them only from *speaking* on such systems.

As the District Court observed, the target of the ban is the "exercis[e of] editorial discretion" (Pet. App. 101a-102a) — the very act of expression that this Court has held to be protected by the First Amendment in its decisions involving cable television. *Turner Broadcasting*, 114 S. Ct. at 2456; *Los Angeles v. Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986).

With respect to that protected category of speech, § 533(b) is a complete ban. As the FCC has explained, § 533(b) "prohibits [telephone companies] from choosing the video programming to be provided in their local exchange telephone service areas *altogether*." Supp. Br. App. 3a (emphasis in original). It is an "absolute ban" on the direct provision of video programming, *id.*

at 4a, and "a complete ban on editorial control over video programming in a telephone company's service area." *Id.*

Such "an absolute prohibition on a *particular type of expression* will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added). This is true regardless of whether the regulation at issue is content-based. *E.g.*, *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 126 (1991) (Kennedy, J., concurring in judgment).

Thus, this Court has invalidated "laws that foreclose an entire medium of expression," such as the display of signs on private property, even when they are "completely free of content or viewpoint discrimination." *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2045 (1994). "The danger [such laws] pose to the freedom of speech is readily apparent — by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* This Court has also applied exacting scrutiny to strike down content-neutral prohibitions on the distribution of literature, *see Martin v. Struthers*, 319 U.S. 141, 145-49 (1943); *Schneider v. State*, 308 U. S. 147, 164-165 (1939), and on live entertainment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1981).[3]

Indeed, even content-neutral limitations on the *quantity* of a particular type of expression in which a speaker may engage — restrictions that fall short of an outright ban — trigger strict judicial scrutiny. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), for example, this Court applied "exacting scrutiny" to expenditure limitations that were "direct and substantial restraints on the quantity" of speech itself, *id.* at 39, 44-45, even though they were "neutral as to the ideas expressed." *Id.* at 39.

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[3] In each case the Court's scrutiny was exacting. *See, e.g.*, *Martin*, 318 U.S. at 146-49 (applying the tools of what since has become known as "strict scrutiny"); *Schad*, 452 U.S. at 68 (citing strict scrutiny cases). In the most recent case in this line, *City of Ladue*, 114 S. Ct. at 2044-46, this Court did not articulate a standard of review, but made clear that the intermediate scrutiny used for reasonable regulations of time, place, and manner is not appropriate for regulations that "foreclose an entire medium of expression."

Similarly, in *Meyer v. Grant*, 486 U.S. 414 (1988), this Court employed "exacting scrutiny" to strike down a ban on the use of paid petition circulators which "impose[d] a direct restriction which 'necessarily reduces the quantity of expression.'" *Id.* at 419, 420 (citing *Buckley*). This Court rejected the contention that the availability of other means of expression should reduce the degree of judicial scrutiny, explaining that the law "restrict[ed] access to the most effective, fundamental, and perhaps economical avenue of political discourse" and left open only "'more burdensome' avenues of communication." *Id.* at 424. "The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *Id.*[4]

2. Section 533(b) is wholly unlike the types of laws that this Court has reviewed under intermediate scrutiny. To begin with, § 533(b) is not a restriction on "conduct" that has merely an "incidental" effect on speech when applied to a particular example of that conduct that happens to be expressive. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567, 570 (1991) (plurality opinion); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 298 (1984); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The *O'Brien* test itself applies only when "'speech' and 'nonspeech' elements are combined in the same course of conduct." 391 U.S. at 376. Section 533(b) does not involve "speech-plus," or conduct "intertwined," or "intermingled" with speech.[5] Where (as here) a ban falls on speech, and speech alone, *O'Brien's* version of intermediate scrutiny is

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[4] *See also Riley v. Nat'l Federation of Blind, Inc.*, 487 U.S. 781, 788-89 (1988) (explaining that "exacting First Amendment scrutiny" applies to "a direct restriction on the amount of money a charity can spend on fundraising activity" because such a law is "a direct restriction on protected First Amendment activity") (internal quotations omitted).

[5] *See American Radio Ass'n v. Mobile Steamship Ass'n*, 419 U.S. 215, 231 (1974); *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968).

wholly inapplicable.[6]

Nor could § 533(b) qualify for intermediate scrutiny as a reasonable regulation of the time, place or manner of speech — the only basis on which petitioners urge intermediate scrutiny. Govt. Br. 23. There are three criteria for such rules, and § 533(b) fails each one.

First, this Court has made clear that time, place or manner rules must address "[s]ome basic incompatibility . . . between the communication and the primary activity of the area." *Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring). "[T]he question is whether 'the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.'" *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988) (citation omitted).

The Court's time, place or manner cases thus deal only with regulations that restrict the noncommunicative aspects of a speaker's activity, such as its loudness, in order to limit its nuisance impact on others. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989) (regulation of rock-concert volume to preserve sedate character of certain parts of Central Park and surrounding residential areas); *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (upholding regulation of picketing in front of a single residence to prevent intrusion on the privacy of that residence, because picketing focused upon individual residence is "fundamentally different from more generally directed means of communication that may not be completely banned"); *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (time, place or manner cases permit restriction of "certain methods of expression which may legitimately be deemed a public nuisance"); *Kovacs v. Cooper*, 336 U. S. 77 (1949) (prohibition on the use of "loud and raucous" sound trucks on municipal streets upheld because the use of such

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[6] *See also Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech,' . . . not upon any separately identifiable conduct . . . . *Cf. United States v. O'Brien.*").

trucks would leave the unwilling listener "practically helpless to escape this interference with his privacy" and could be thought a "nuisance").

Under this criterion, § 533(b) is plainly not a "time, place, or manner" rule. It prohibits telephone companies from engaging in an entire type of speech — video programming. Yet there is no allegation that the provision of such speech is somehow a "public nuisance." There can be no argument that providing video programming to individuals who wish to receive it is somehow incompatible with any other activity that the Government seeks to protect. Squarely applicable here is *Lovell v. Griffin*, 303 U.S. 444 (1938), where this Court made clear that a ban on handbilling could not be considered a "time, place, or manner" rule because "[t]here is . . . no restriction in [the] application [of the ban on circulars] with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." *Id.* at 451; *see also City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (under *Schneider v. State*, 308 U.S. 147 (1939), ban on leafleting in public streets cannot be considered time, place, or manner rule).

A second criterion for time, place, and manner rules is a corollary of the first: a regulation must apply evenhandedly to all speakers, because it must be concerned with the incompatibility of that *manner* of speech with some other activity in the same area. This Court thus has never deemed a law to be a "time, place, or manner" rule unless it applied evenhandedly to all speakers. *See City of Lakewood*, 486 U.S. at 763 ("In contrast [to a time, place, or manner rule], a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship."). Indeed, speaker-specificity in a speech regulation independently triggers strict scrutiny. *See* Part IV, *infra*. Under § 533(b), of course, only telephone companies are forbidden from providing video programming directly to consumers.

The third criterion is that time, place, or manner rules must permit the speaker to communicate his or her chosen content to his or her desired audience. For example, in *Ward v. Rock Against Racism, Inc.*, 491 U.S. 781 (1989), this Court explained that the regulation on loudness had "no material impact on any performer's ability to exercise complete artistic control over sound quality" of the performance delivered to its audience. *Id.* at 802. Similarly, in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the respondents, who were permitted to sell or distribute literature only from a fixed location (a booth) within a state fairground, were nonetheless able to hand the same literature to their desired audience within the very forum in question. *See id.* at 655. And in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court upheld a conviction of a protester under an antinoise ordinance that applied in areas next to schools when classes were in session. The ordinance, however, permitted even noisy demonstrations "before or after the school session, while the [same] student/faculty 'audience' enters and leaves the school." *Id.* at 120.[7]

By contrast, § 533(b) prohibits telephone companies from using the Nation's most important medium of expression to speak directly with their most natural audience: customers in their local service areas. If § 533(b) were characterized as a "time, place, or manner" restriction, any prohibition on speech could be similarly described. For example, the ban on the payment of petition circulators struck down in *Meyer v. Grant*, 486 U.S. 414 (1988), could be deemed a mere limitation on the manner of communicating with voters. Even a ban on book publishing could be characterized as a prohibition on a single "manner" of printed speech. Such reasoning would eviscerate the First Amendment.

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[7] In *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), this Court noted that there was no evidence that "appellees' ability to communicate effectively is threatened." *Id.* at 812; *see also Frisby v. Schultz*, 487 U.S. 474, 483, 484 (1988) (noting that the ban on residential picketing did not impair communication); *Ladue*, 114 S. Ct. at 2045-46 (noting that the laws in *Vincent* and *Frisby* did not foreclose speech).

3. Lastly, § 533(b) is not an access rule about sharing the use of finite capacity, like the must-carry rules at issue in *Turner Broadcasting*. This Court noted that the must-carry rules "do not produce any net decrease in the amount of available speech," "leave cable operators free to carry whatever programming they wish on all channels not subject to the must-carry requirements," and do not "diminish the free flow of information and ideas." 114 S. Ct. at 2462, 2466. The must-carry rules do not ban a cable operator from speaking. By contrast, § 533(b) is a "must *not* carry" rule for telephone companies.

II. SECTION 533(b) IS INDEPENDENTLY SUBJECT TO STRICT SCRUTINY AS A CONTENT-BASED RESTRICTION ON SPEECH

Section 533(b) also triggers strict scrutiny for the independent reason that it is content-based.

A. The Statutory Definition of "Video Programming" Is Content-Based

1. This Court has made clear that strict scrutiny applies to prohibitions on speech that by their very terms require examination of the content of communication. For example, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court invalidated a ban on "editorials" by public broadcast stations receiving government funds. This Court observed that "the scope of [the] ban is defined solely on the basis of the content of the suppressed speech": "in order to determine whether a particular statement by station management constitutes an 'editorial' proscribed by [the statute], enforcement authorities must necessarily examine the content of the message that is conveyed." *Id.* at 383. In *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1513, 1516-17 (1993), this Court held that the distinction between "commercial handbills" and "newspapers" is content-based, even though "[t]here is no doubt a 'common sense' basis for distinguishing between the two." The Court explained that

"'official scrutiny of the content of publications . . . is entirely incompatible with the First Amendment.'" *Id.* at 1514 n.19.

And in *Burson v. Freeman*, 504 U.S. 191 (1992), this Court held that a statute prohibiting the solicitation of votes and the display of campaign materials within 100 feet of a polling place was content-based. A plurality explained that "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display." *Id.* at 197. Accordingly, the plurality indicated that the statute's *terms*, which "distinguish[ed] among types of speech," "require[d] that the statute be subjected to strict scrutiny." *Id.* at 207.[8]

2. Section 533(b) falls into this category of forbidden laws. The speech banned by § 533(b) is defined exclusively in content-based terms: "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19).[9] The scope of § 533(b)'s

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[8] This Court's decision in *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994), is to the same effect. The Court did not find the must-carry rules to be content-based, but only because the rules did not "favor programming of a particular subject matter, viewpoint, or *format*." *Id.* at 2461 (emphasis added). The Court observed that, with respect to the must-carry rules, "the extent of the interference [with speech] does not depend on the content of the cable operators' programming." *Id.*; *see also id.* (must-carry rules apply "irrespective of the programming [cable operators] choose to offer"). By contrast, § 533(b) is content-based because its application depends completely on the communicative substance of the programming that a telephone company chooses to provide.

Four Justices would have invalidated even the must-carry rules as an impermissible content-based regulation of speech. *See* 114 S. Ct. at 2476-79 (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., concurring in part and dissenting in part); *id.* at 2481 (Ginsburg, J., concurring in part and dissenting in part).

[9] Notably, the original FCC regulations forbade telephone companies from providing "CATV service," defined not in terms of speech content but rather as a "facility" for "receiv[ing]" broadcast signals and "distribut[ing]" them to subscribers. *Second Report on CATV Systems*, 2 FCC 2d 725 (1966).

prohibition turns on an assessment of the expressive content and communicative effect of the speech.

The District Court recognized that § 533(b), "as written and enacted, requires reference to the content of the relevant message in order to determine whether a particular visual image qualifies under the statutory definition of 'video programming.'" Pet. App. 84a. For example, § 533(b) permits telephone companies to provide local subscribers with visual images such as the face of a clock reflecting the current time, or the image of a person speaking to the viewer by picture-phone. *Id.* at 85a. But telephone companies may not provide programming comparable to that provided by a television broadcast station in 1984 (the year of § 533(b)'s enactment), like TV shows and movies. As the District Court concluded, "there is simply no way that § 533(b) . . . can be applied without reference to the content of the message being conveyed." *Id.*

In fact, the Government conceded in the District Court that a ban enumerating 1984 television programming show-by-show — "the MacNeil/Lehrer Newshour," "news programs," "sitcoms," and so on — would be content-based and "would not be constitutional." *Id.* at 85a-86a n.22. The District Court asked, "If you got out the T.V. Guide for 1984 you could end up with a generic list of all the stuff that [was] on television [that year] . . . . What's the difference [between that and the statutory definition of video programming]?" *Id.* Neither petitioner had any response.

3. The Government admits that the statute requires the FCC, in determining whether a particular video image is prohibited, to judge whether it is "'comparable to [the programming] provided by broadcast television stations in 1984.'" Govt. Br. 21 (quoting *Video Dialtone Order*, 7 FCC Rcd 5781, 5820 (1992)). The Government contends, however, that "the statute [merely] distinguishes the one-way, non-interactive television technology familiar to Congress in 1984 from other forms of speech that were under development at the time . . ., such as interactive video and videotext." *Id.*

But the statute simply does not draw this mechanically-applicable, content-neutral technological distinction between one-way transmission and two-way interactive communication. Many

kinds of one-way transmission are permitted by § 533(b), and many kinds of two-way interactive communication are prohibited by the statute.

The Cable Act itself makes clear that the inclusion of a two-way capability does not take programming out of the ban. The Act defines "cable service" to include only "one-way . . . video programming," 47 U.S.C. § 522(6)(A) — indicating that one-way transmissions are but a subset of "video programming." Accordingly, the FCC has explained that two-way video services, like interactive television shows, would nonetheless be prohibited by § 533(b). *Video Dialtone Order*, 7 FCC Rcd at ¶ 75.

Conversely, the one-way nature of certain transmissions does not necessarily make them "video programming." The Commission has explained, for example, that "one-way . . . news services and stock market information, pay-per-view, one-way transmission of video games and computer software, on-line airline guides, and other programming services" are not "video programming," notwithstanding their prominent video components. *Id.* at ¶ 77.

Hence, the definition of "video programming" does not hinge on a technical distinction between one-way and two-way communication. Rather, it operates according to an inherently content-based inquiry: whether particular video images are sufficiently "comparable" to broadcast television programming. For example, a picture of an automobile on a television screen might be a display generated by a video game (not "video programming," even if transmitted over telephone lines to a subscriber), or part of a video catalogue (not "video programming"), or a scene in a television show ("video programming," unless, for instance, the scene is an excerpt used as part of an interactive multimedia presentation). The statute's line between the forbidden and the permissible is drawn in terms of the speaker's infusion of creativity (did the speaker create or structure the image or sequence of images so that the result is "comparable" to broadcast television circa 1984?) and the speech's communicative impact on the minds of viewers (does the audience perceive the image as "comparable" to broadcast television?).

Those distinctions simply cannot be made without reference to the content of the programming. *See* J.A. 157-61 (Affidavit of William E. Lee ¶¶ 28-35).[10]

4. Echoing its mischaracterization of § 533(b) as a "time, place, or manner" rule, the Government also contends that § 533(b) is not content-based because it is a regulation on the "'mode of delivery of the speech.'" Govt. Br. 20-21. This Court rejected the parallel argument both in *Burson*, 504 U.S. at 197, and in *Discovery Network*, 113 S. Ct. at 1516. Section 533(b) does not ban the delivery of information by wires, or even in video form on a television screen. Rather, it bans only the expressive packaging of *certain* video images, depending on their content. Section 533(b) can no more be justified as a restriction on the "mode of delivery" of speech than the ban on editorials in *FCC v. League of Women Voters* could be justified as a restriction on the delivery of information through the "mode" of an editorial, or the prohibition on unsigned campaign literature in *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995), could be upheld as a limit on the "mode" of anonymous speech.[11]

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[10] In the Court of Appeals, NCTA argued that § 533(b) was "content-neutral" because it drew a "market" distinction between "cable service" and telephony. This claim is unsupportable. The Cable Act uses the phrases "cable operator," "cable service," and "video programming" separately, not interchangeably. In § 522(19), Congress provided a specific definition of "video programming." Thus, the FCC was certainly correct in the *Video Dialtone Order* when it rejected the argument that Congress meant to equate "video programming" with "cable service." 7 FCC Rcd at ¶ 75 n.194. In any event, § 533(b) would still be subject to strict scrutiny, even if it were a "market-based" ban. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 232 (1987) (market-based measure which exempted certain magazines from tax in order "to encourage 'fledgling' publishers" was invalid because, "[i]n order to determine whether a magazine is subject to sales tax, . . . 'enforcement authorities must necessarily examine the content of the message that is conveyed'") (citation omitted).

[11] Because § 533(b) regulates speech according to its *expressive* content, it is not akin to the limitations on *nonexpressive* aspects of photographic reproductions, like their size and color, upheld in *Regan v. Time, Inc.*, 468 U.S. 641 (1984). Instead, § 533(b) is like the statutory provision invalidated

5. The Government further suggests that § 533(b) is content-neutral because it does not "contain any reference to the *subject matter* of television programs" or to the particular "*ideas* expressed in the message." Govt. Br. 21, 22 (emphases added). But this is not the test. The First Amendment requires that content-based laws be subject to strict scrutiny even if they are neutral as to subject matter or viewpoint. Thus, the prohibition invalidated in *FCC v. League of Women Voters* applied to all editorials regardless of subject matter or viewpoint. "'Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*.'" *Ragland*, 481 U.S. at 229-30 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added)); *see also Burson*, 504 U.S. at 197; *Boos v. Barry*, 485 U.S. 312, 319 (1988) (plurality opinion).

For all these reasons, § 533(b) is subject to strict scrutiny as a content-based ban on speech.

B. Neither Congress' Motives Nor Post Hoc Justifications Can Alter the Conclusion That Strict Scrutiny Applies

1. The most novel argument advanced by the Government is that, even though by its terms § 533(b) bans speech according to content, intermediate scrutiny is nonetheless appropriate because the statute can be "'*justified* without reference to the content of regulated speech.'" Govt. Br. 22 (quoting *City of Renton v.*

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in *Regan*, which prohibited the publication of any photograph of U.S. currency except for educational, historical, and newsworthy purposes: "A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph . . . . Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Id.* at 648-49.

Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).[12]

This Court, however, has flatly rejected the suggestion that a law otherwise subject to strict scrutiny should receive lesser scrutiny simply because a reason for the law can, with enough creativity, be devised without reference to the content of speech. For example, this Court applied strict scrutiny to the facially content-based laws at issue in *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984), *Burson v. Freeman*, 504 U.S. 191, 197, 207 (1992), *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), and *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984), without pausing to consider possible content-neutral justifications. *Burson v. Freeman* is illustrative: There, this Court applied strict scrutiny even though the State asserted an interest not in suppressing communication but rather in preventing fraud and intimidation by campaigners who might "physically interfere[] with electors attempting to cast their ballots." 504 U.S. at 209 n.11. *See also Cincinnati v. Discovery Network*, 113 S. Ct. at 1516-17 (irrelevant that "the *justification* for the regulation is content neutral," because "the *very basis* for the regulation is the difference between ordinary newspapers and commercial speech. . . . [W]hether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack") (emphasis added).

Thus, in *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994), this Court confirmed that strict scrutiny is triggered by laws like § 533(b) that by their terms proscribe speech on the basis of its content — *without further inquiry into legislative purpose*. This Court explained that, "while a content-based purpose may be sufficient in certain circumstances to show

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[12] The Government notes that the District Court followed its view of *Renton*, but fails to mention that the court expressed grave "misgivings" about this interpretation of the First Amendment, noting that it was a "significant retreat from the traditional content-based/content-neutral distinction," Pet. App. 89a, 93a, and predicting that its novel approach would "gut[]" the distinction between content-based and content-neutral restrictions of speech. *Id.* at 90a.

that a regulation is content-based, it is not necessary to such a showing in all cases," since "'illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Id.* at 2459 (citation omitted). "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, *on its face*, discriminates based on content." *Id.* (emphasis added). This Court looked to the justifications proffered by the Government only *after* determining that the rules were not "on their face" content-based. *Id.* at 2460.

First Amendment jurisprudence would look very different indeed if the mere invocation of a content-neutral justification were enough to avoid strict scrutiny, for it is "invariably the case [that] the government can frame the interest served by [a restriction] in essentially speech-neutral terms." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1451 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).[13]

2. The Government's argument rests on a misapplication of this Court's decision in *Renton* and similar cases. In reviewing laws that are *not* on their face content-based bans on speech and thus do not otherwise trigger strict scrutiny, this Court has asked whether such laws, although *ostensibly* based on noncommunicative attributes of speech, should *nevertheless* be subjected to strict scrutiny because, in reality, they are attempts to suppress speech on the basis of content. But this is a one-way ratchet, for this Court has reserved such analysis for laws that are aimed, as

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[13] For example, in *Simon & Schuster*, 502 U.S. at 108, 118, the State asserted an interest in compensating the victims of crime; in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-60 (1990), the State asserted an interest in preventing the appearance or reality of corporate corruption of the political process; in *Riley*, 487 U.S. at 789, the State asserted an interest in preventing fraud; in *Boos v. Barry*, 485 U.S. at 322, the Government asserted an interest in protecting the dignity of foreign diplomatic personnel; in *Pacific Gas & Electric*, 475 U.S. at 19, the State asserted an interest in effective ratemaking proceedings; and in *Consolidated Edison Co. of New York v. Public Service Comm'n*, 447 U.S. 530, 540-43 (1980), the State asserted interests in protecting individual privacy, allocating limited resources in the public interest, and protecting utility ratepayers.

a facial matter, at the "nonspeech" elements of an expressive act, such as its noise level, *see Ward*, 491 U.S. at 791-92, or its location within a community. *See Renton*, 475 U.S. at 46, 54.[14]

In particular, *Renton* — on which the Government would rely — concerns "time, place, and manner rules," 475 U.S. at 46, not a law like § 533(b), which not only directly bans speech as such, but also uses the "content" of speech to define the very substance of what is banned. The Renton ordinance did "not ban adult theaters altogether," 475 U.S. at 46, and in fact left adult theaters undiluted freedom "to open and operate . . . within the [same] city." *Id.* at 54. It "merely provide[d] that such theaters may not be located within 1,000 feet away from any residential zone, single- or multiple-family dwelling, church, park, or school." *Id.* at 46. The ordinance was no more objectionable than a "content-based" public library rule assigning books about geometry and books about geology to different shelves.

There is a world of difference between such "traffic cop" rules that make innocent reference to content in the course of non-intrusively regulating *when*, *where*, and *how* speech directed to a given audience may occur, and prohibitions that use content to determine *whether* the speech in question may be provided to that audience *at all*. Section 533(b), with its ban on "home-town" video programming, is akin to the city-wide ban on adult theaters that *Renton* expressly left subject to strict scrutiny.[15]

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[14] In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), for example, this Court described the "justified-without-reference" test as applicable only to "time, place, or manner" restrictions, *see id.* at 2544, and refused to consider the city's interests as a rationale for reducing the strict scrutiny otherwise triggered by "a facially content-based statute." *Id.* at 2549; *see also Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116, 122 n.* (1991) (holding that "Son of Sam" law was "content-based," without resolving the question whether the statute had a "content-neutral" justification under *Ward* and *Renton* — demonstrating that the analysis in *Ward* and *Renton* is not the exclusive means for determining whether legislation is content-based).

[15] Thus, in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976), a decision that "largely dictated" the Court's reasoning in *Renton*, 475 U.S.

3. The Government nonetheless insists that strict scrutiny is inappropriate here because § 533(b) supposedly "is not motivated by any hostility to any message," Govt. Br. 20, and was not "designed" to suppress speech. *Id.* According to the Solicitor General, the "objective" (*id.*) and "purpose" (*id.* at 22) of Congress were entirely pure.

To begin with, these assertions are far too speculative to support a facially content-based restriction on speech. Ascertaining the "motive" and "purpose" of the 1984 Congress — as if it were a unitary entity — is an enterprise fraught with difficulty. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting). And the effect on speech is the same regardless of the subjective intent of individual Members of Congress.

More fundamentally, the bright line rule that "a regulation that *on its face* draws content distinctions" ordinarily triggers strict First Amendment scrutiny, is essential to eliminate the risk of the censorship of ideas. *Ladue*, 114 S. Ct. at 2047 (O'Connor, J., concurring) (emphasis added). Thus, this Court has consistently held that strict scrutiny does not depend on a showing that

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at 46, this Court also upheld an adult theater zoning ordinance. But a plurality pointedly noted that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S. at 71 n.35; *see also id.* at 79 (Powell, J., concurring) (ordinance did not involve "any significant overall curtailment of adult movie presentations"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981) ("Here, the Borough totally excludes all live entertainment, including non-obscene nude dancing that is otherwise protected by the First Amendment. As we have observed, *Young* . . . did not purport to approve the total exclusion from the city of theaters showing adult, but not obscene materials. It was carefully noted in that case that the number of regulated establishments was *not* limited.") (emphasis added). Nor did *Renton* or *Young* involve outright bans on the local exhibition of sexually explicit films; in such a case, even the city's invocation of "secondary effects" could not save the ban from strict scrutiny. *Cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975). Far from questioning these precedents, *Renton* expressly reaffirmed them, explaining that the narrowness of the zoning rule in that case "avoid[ed] the flaw that proved fatal . . . in *Schad* and *Erznoznik*." 475 U.S. at 52.

Congress intended to silence communication of a particular message.[16] Indeed, in *O'Brien* itself this Court denounced inquiry into legislative purpose as "a hazardous matter." 391 U.S. at 383; *see also id.* at 383-84 n.30.

The hazards are apparent here. The Government's conjecture notwithstanding, it appears that, if anything, Congress proceeded on decidedly content-based assumptions about the value of telephone company speech. The key House Report justified § 533(b)'s ban on video programming on the ground that it would "foster the availability of a 'diversity of *viewpoints*' to the listening audience." H.R. Rep. No. 934, 98th Cong., 2d Sess. 31 (1984) (emphasis added). In this very litigation, petitioners have defended § 533(b) on the ground that, "although the telephone companies contemplate First Amendment activities, they would not be the same as those of newspapers," Govt. Reply Br. in Ct. App. 4 (Dec. 30, 1993); that the telephone companies had made "no claim that the content of [their] channels would be unique," NCTA Reply Br. in Ct. App. at 7 (Dec. 30, 1993); and that "it is fanciful to believe that Bell Atlantic . . . would make available a whole range of programming (*e.g.*, movies) not offered by independent cable operators." *Id.*

The assumption that telephone companies' involvement in the cable industry will, on balance, subtract from, rather than add to, "diversity" — not simply of *ownership* but also of *viewpoint* — is *necessarily* based in part on the expected content of their speech. *See Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 12 (1986) (holding that a law mandating

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[16] In *Discovery Network*, for example, this Court acknowledged that "there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications." 113 S. Ct. at 1516. Nonetheless, this Court found the city's "mens rea" irrelevant. *Id.*; *see also Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) ("'even regulations aimed at proper governmental concerns'" — as opposed to the suppression of ideas — are subject to strict scrutiny if they fall "only on speech of a particular content"); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

access to a utility company's billing envelopes that was designed to "offer the public a greater variety of views" was content-based and was invalid under the First Amendment).

In sum, none of the Government's arguments warrants the application of less than strict scrutiny.

III. SECTION 533(b) IS INVALID BECAUSE IT VESTS AN ADMINISTRATIVE AGENCY WITH IMPERMISSIBLE DISCRETION OVER SPEECH

1. There is yet a third reason why § 533(b) must be subjected to more than intermediate scrutiny and necessarily violates the First Amendment. Administrative regulation of speech is invalid *per se* unless it operates according to content-neutral standards that are "'narrow, objective, and definite.'" *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992) (citation omitted). "The reasoning is simple: If [such a] scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." *Id.* at 2401-02 (citations omitted). The possibility of case-by-case judicial review cannot save such a statute, since without narrow guideposts, "post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988).[17]

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[17] *See also City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1513 n.19 (1993); *Interstate Circuit v. Dallas*, 390 U.S. 676, 683-85 (1968); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938).

2. Section 533(b) violates this principle. The substantial latitude left the FCC in appraising facts, exercising judgment, and forming an opinion as to whether particular video images amount to "video programming" is impermissible under the First Amendment. For example, the FCC has already recognized that, although "an educational multimedia presentation" is *not* "video programming," "the simple inclusion of *some* textual information [could not] transform a severable video program into a permissible multimedia presentation." *Video Dialtone Order*, at ¶ 76 n.196. Left unsaid, and unknowable from the statute's language, is where the line will be drawn on the spectrum that ranges from "severable video programs," at one end, to "multimedia presentations," on the other. Indeed, the Commission has admitted that "it is not possible to classify with precision all potential services" to determine whether they qualify as "video programming" and has warned that "the examples we now set forth are by no means exhaustive." *Id.* at ¶ 74.

Tellingly, the government itself found the phrase "video programmers" "too vague and ambiguous" to permit an answer to one of the paragraphs in the plaintiffs' complaint in this case. *See* J.A. 20. Even if a rough-and-ready "I know it when I see it" approach could be deemed sufficient for separating hard-core pornography from protected speech, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), it surely is not adequate for classifying different categories of protected speech.

3. The dangers of such administrative discretion cannot be brushed aside. If the FCC were to find that a video image provided by a telephone company amounted to "video programming," it could seek a federal criminal prosecution pursuant to 47 U.S.C. § 401(c), or initiate administrative forfeiture proceedings of its own. Indeed, a prior case involving the constitutionality of § 533(b) under the First Amendment, in which the court did not reach the issue, began as an FCC enforcement proceeding triggered by complaints by a competing cable company. *See Northwestern Indiana Telephone Co. v. FCC*, 824 F.2d 1205 (D.C. Cir.), *appeal after remand*, 872 F.2d 465 (D.C. Cir. 1987), *cert. denied*, 493 U.S. 1035 (1990). The

telephone company was a tiny independent — a family-run business — that had wired only 500 homes for cable. Nonetheless, the FCC imposed a $20,000 civil forfeiture and awarded the cable company damages. *Comark Cable Fund III*, 100 F.C.C.2d 1244 (1985).

The broad discretion afforded the FCC by § 533(b) renders the statute invalid on its face.

IV. SECTION 533(b) TRIGGERS STRICT SCRUTINY FOR THE FURTHER REASON THAT IT SINGLES OUT TELEPHONE COMPANIES FOR A SPECIAL BAN ON SPEECH

Even apart from the reasons already adduced, strict scrutiny is required because § 533(b) bans the speech of only a single class of speakers. It bans expression only by speakers that began as telephone companies, but now are able to provide cable service, while leaving speakers that began as cable companies (but now are able to provide telephone service over their networks) free to speak. Section 533(b) is thus akin to a law prohibiting a specific group from participating in a parade down Main Street.

Under established constitutional principles, the selectivity of § 533(b) calls for a compelling justification by the Government. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak *and the speakers who may address a public issue.*" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978 (emphasis added).[18]

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[18] *See also Simon & Schuster*, 502 U.S. at 117 ("[t]he Government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker"); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (describing *Bellotti* as involving a "speaker-based restriction"); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 680-81 (1990) (Scalia, J., dissenting) (noting that corporate nature of speaker does not justify suppressing its speech); *Perry Education Ass'n*, 460 U.S. at 55 (restricting the access of a "single class of speakers" to a particular avenue of communication can be justified only by "compelling reasons"); *Madison*

This case does not involve evenhanded regulation of all members of a single medium, as in *Turner Broadcasting*, and *Leathers v. Medlock*, 499 U.S. 439 (1991). Section 533(b) applies not to all would-be providers of video programming over their networks, but only to those entities that began as telephone companies. Yet able companies increasingly provide many types of telephone services. *See, e.g.*, J.A. 187-88, 202-04; *NCTA v. FCC*, 33 F.3d 66, 69 (D.C. Cir. 1994) (explaining the "blurring" of the line between voice and video technologies); NCTA Br. 9, 37 & n.31 (noting the entry of cable companies into telephony). Nor does § 533(b) bar electric utilities from providing video programming directly to their customers, even though such speech would be subject to exactly the same arguments as those advanced by petitioners here. In fact, "[m]ost utility poles and conduits are owned not by telephone companies but by other utilities, and these utilities may and do provide cable television themselves, in competition with cable companies." JA 185-86; *see also id.* at 198-99.

This case involves discrimination among speakers within a single medium of the kind that this Court has always considered invalid. In *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), for example, this Court invalidated a special paper and ink tax "because it targets a small group of newspapers." *Id.* at 591. The Court did not "impugn the motives of the Minnesota Legislature," but it explained that "to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." *Id.* at 592. Similarly, in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), this Court struck down

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School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 (1976) (public board may not "discriminate between speakers" at its meetings); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression").

a tax on publications with weekly circulations above 20,000, which fell on 13 of the approximately 135 newspapers in the State.

This Court reaffirmed this principle in *Leathers*, explaining that "narrow targeting of individual members" of a particular medium "offends the First Amendment." 499 U.S. at 446; *see also id.* at 447 ("A tax is . . . suspect if it targets a small group of speakers"). In contrast, in *Turner Broadcasting* this Court emphasized that "the must-carry provisions are not structured in a manner that carries the inherent risk of undermining First Amendment interests. The regulations are broad-based, applying to almost all cable systems in the country, rather than just a select few." 114 S. Ct. at 2468. "As a result," this Court concluded, "the provisions do not pose the same dangers of suppression and manipulation that were posed by the more narrowly targeted regulations in *Minneapolis Star*." *Id.*

Here, the selective ban imposed by § 533(b) applies only to certain providers of video programming — telephone companies. It is significantly more burdensome than the discriminatory taxes at issue in *Minneapolis Star* and other cases where this Court has applied strict scrutiny. And it is not "broad-based" in a way that avoids the "inherent risk of undermining First Amendment interests." *Turner Broadcasting*, 114 S. Ct. at 2468.

The discriminatory nature of § 533(b) provides an additional reason that strict scrutiny is warranted.

CONCLUSION

For these independent reasons, § 533(b) is subject to strict judicial scrutiny. Because no party before the Court suggests that the statute can survive such scrutiny, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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